UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CYTOTHERAPEUTICS, INC., Plaintiff,	
v.	C.A. No. 97-019L
NEUROSPHERES LTD., Defendant.	

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge.

This dispute arises from an agreement entered into by plaintiff Cytotherapeutics, Inc. (based in Rhode Island) and defendant Neurospheres Ltd. (based in Calgary, Alberta, Canada). Pursuant to that agreement, plaintiff received a license from defendant for the commercial development, sale and use of "in vitro generated, EGF-responsive neuronal stem cells." Plaintiff now claims that defendant has violated that agreement by altering its interpretation of the term "epidermal growth factor" or "EGF" and that said breach causes injury to plaintiff in Rhode Island. Therefore, plaintiff has brought suit in Rhode Island seeking expedited discovery and a preliminary injunction to hold the status quo until arbitration can be conducted in Toronto, Ontario, Canada.

This case is presently before the Court on defendant's motion to dismiss for lack of personal jurisdiction or, in the

alternative, on the basis of forum non conveniens. For the reasons that follow, decision on defendant's motion is deferred. Additional discovery by the parties will be allowed over the next thirty (30) days on the issues of personal jurisdiction and forum non conveniens, and then the Court will conduct a full evidentiary hearing on those issues.

I. Facts

The facts essential to the resolution of this motion are as follows. Plaintiff is a bio-pharmaceutical company based in Rhode Island and incorporated in Delaware. Defendant is incorporated under the laws of Alberta, Canada, and its place of business is in Calgary.

In March of 1994, the parties entered into an agreement under which plaintiff received a license for the commercial development, sale and use of "in vitro generated, EGF-responsive neuronal stem cells" for use in transplantation to treat human disease, in exchange for supplying large sums of money for continued research and development by defendant. The licensing agreement states that it shall be interpreted in accordance with the laws of Alberta. The contract also provides for alternate dispute resolution "with respect to any matter relating to" the agreement. Pursuant to the contract, such matters will be dealt with first by mediation and then binding arbitration to be conducted by the International Chamber of Commerce of Toronto, Canada.

The licensing agreement between the parties is currently a source of controversy, as plaintiff claims that defendant has broken the contract and is now negotiating with plaintiff's competitors for licensing agreements. Plaintiff has moved for, and intends to pursue, arbitration on the merits of the dispute in Canada, as provided by the licensing agreement. However, on January 13, 1997, plaintiff brought suit in this Court seeking expedited discovery and immediate injunctive relief pending arbitration.

On January 16, 1997, defendant commenced an action in Alberta, Canada. The Provincial Court there temporarily restrained plaintiff Cytotherapeutics, Inc. from pursuing its claims in this Court, but subsequently lifted that temporary restraining order.

After the restraining order was vacated, this Court conducted a hearing on defendant's motion to dismiss for lack of personal jurisdiction or for forum non conveniens. At that time, this Court determined that facts essential to the resolution of the motion were unknown and ordered the parties to submit supplemental affidavits and/or memoranda concerning the formation of the contract.

Both parties have filed supplemental affidavits and memoranda. Defendant argues that the final act which caused the contract to become binding occurred in Calgary, thereby rendering the exercise of specific jurisdiction in Rhode Island

inappropriate. In contrast, plaintiff asserts that the final act of contract formation occurred in Rhode Island, and, therefore, this Court has specific personal jurisdiction in this case.

In the alternative, defendant contends that the present case should be dismissed by this Court on the basis of forum non conveniens. Defendant argues that Alberta provides a suitable alternate forum for this dispute, and all the "relevant and essential sources of proof" are located in Alberta. Defendant's arguments are premised on its view that this controversy is essentially based in Canada. In contrast, plaintiff disputes that the relevant witnesses and documents are exclusively in Canada. Rather, it is plaintiff's contention that the present dispute is global in nature, with serious effects in Rhode Island.

II. Discussion

A. Personal Jurisdiction

A court may exercise "specific jurisdiction" when "plaintiff's claims 'arise out of' or are 'directly related' to defendant's contacts with the forum state." DuPont Tire Serv. Ctr., Inc. v. N. Stonington Auto-Truck Plaza, Inc., 659 F. Supp. 861, 863 (D.R.I. 1987) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).[1] In

[1] In contrast, a court may exercise "general jurisdiction" when "plaintiff's claims do not arise out of or are not directly related to defendant's contacts with the forum state . . ." if those contacts are continuous and substantial. Id. (citing Helicopteros Nacionales, 466 U.S. at 414 n.9). At the hearing,

DuPont Tire, this Court held that it could exercise specific jurisdiction over a defendant when the defendant's sole contact with Rhode Island was a trip to the state to negotiate a contract. Since the dispute arose from that contract, and the contract was completed in Rhode Island, the Court found that the defendant had "purposefully directed" its behavior toward Rhode Island, rendering itself subject to suit in this state. See DuPont Tire, 659 F.Supp. at 863-864 (quoting Asahi Metal Ind. Co. v. Superior Court of California, 480 U.S. 102, 112 (1987)).

Relying on DuPont Tire, at the hearing on this matter this Court inquired as to where the final act in the formation of the contract occurred. Both sides gave equivocal responses, so the Court asked for additional information. The supplemental affidavits and memoranda submitted make contrary claims as to where the contract was formed. Plaintiff states Rhode Island, and defendant says Alberta. Since a pivotal factor in the requisite analysis is disputed, this Court finds itself unable to decide the issue of personal jurisdiction at this time.

In other cases where facts relevant to the issue of personal jurisdiction were disputed, this Court viewed the facts favorably to the plaintiff and proceeded to trial, even though plaintiff bears the burden of proving that the exercise of personal jurisdiction is proper. For example, in Thompson Trading Ltd. v.

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plaintiff conceded that defendant's contacts with Rhode Island are not sufficient to sustain a finding of general jurisdiction.

Allied Lyons PLC, 123 F.R.D. 417 (D.R.I. 1989); 124 F.R.D. 534 (D.R.I. 1989) (denying motion for reconsideration), this Court held that plaintiff's allegations, if true, would subject the defendants to the Court's specific in personam jurisdiction. Therefore, the Court allowed the case to proceed to trial for further inquiry. See also McAleer v. Smith, 728 F. Supp. 857 (D.R.I. 1990) (holding that plaintiffs had alleged a prima facie case for the exercise of personal jurisdiction, but noting that plaintiffs still had the burden of proving proper exercise of such jurisdiction at trial).

However, the present matter differs from other cases in this context. For example, in Thompson, 124 F.R.D. at 535, this Court expressly stated that the issues concerning personal jurisdiction were "intertwined" with the merits of the dispute. In contrast, the facts concerning personal jurisdiction in the case at bar may be decided without reaching the substantive aspects of the controversy. Moreover, notions of comity are particularly salient in the present case, as it involves arbitration on the merits of the dispute in Canada. For these reasons, it is important that this Court ascertain the facts relevant to the issue of personal jurisdiction before deciding whether to grant plaintiff injunctive relief.

As plaintiff has suggested, resolution of these issues would be facilitated by additional discovery. See El-Fadl v. Central Bank of Jordan, 75 F.3d 668 (D.C. Cir. 1996) (remanding case for

additional discovery concerning whether contacts were sufficient to support the exercise of general personal jurisdiction). Therefore, this Court orders that there be a thirty day period for additional discovery, to be followed by a full evidentiary hearing on the issue of personal jurisdiction.

B. Forum Non Conveniens

If this Court determines that it has specific personal jurisdiction over defendant, it may still dismiss this suit on the basis of forum non conveniens. This doctrine "permits discretionary dismissals on a 'case by case' basis where an alternative forum is available in another nation which is fair to the parties and substantially more convenient for them or the courts." Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1349 (1st Cir. 1992), cert. denied, 508 U.S. 912 (1993)(citations omitted)(hereinafter "Mercier II").

In the First Circuit, courts have conducted a two-part inquiry when determining whether to dismiss a suit on this basis. See, e.g., Id. First, the court will determine whether there is an adequate alternate forum. A forum is deemed adequate if it is both "available" and "adequate." Id. at 1349-1350. A forum is "available" if "the defendant who asserts forum non conveniens is amenable to process in the alternative forum." Id. at 1349. A forum is "adequate" unless "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." Piper Aircraft Co. v. Reyno, 454 U.S.

235, 254 (1981). See also Mercier II, 981 F.2d at 1350. It is the defendant's burden to prove the adequacy of the alternative forum, for "[t]he plaintiff's forum choice 'should rarely be disturbed.'" Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 424 (1st Cir. 1991) (quoting Gulf Oil v. Gilbert, 330 U.S. 501, 508 (1947))(hereinafter "Mercier I").

Second, the court will evaluate the convenience of the forum by weighing the public and private factors articulated by the Supreme Court in Gulf Oil Corp. v. Gilbert. In Gilbert, the Court stated that when considering the "private interest of the litigant,"

> [i]mportant considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508. See also Thomson Info. Svcs., Inc. v. British Telecommunications, PLC, 940 F.Supp. 20, 23 (D. Mass. 1996). When examining the "[f]actors of public interest," the Court noted that congestion in the forum, the forum's relationship to the litigation, and the forum's familiarity with the law governing the case are significant. Gilbert, 330 U.S. at 508-509. See also Mercier II, 981 F.2d at 1354; Howe v. Goldcorp Investments, Ltd, 946 F.2d 944, 951 (1st Cir. 1991), cert. denied, 502 U.S. 1095 (1992).

Plaintiff asserts, and this writer agrees, that defendant

has merely made "conclusory allegations" concerning the adequacy of Alberta as a forum for the present dispute. Defendant has responded to several arguments made by plaintiff concerning the adequacy of Alberta; however, defendant has not affirmatively shown why Alberta is an adequate forum. More specifically, defendant has not discussed Alberta's procedural rules or substantive law concerning the issues at hand -- the granting of expedited discovery and maintaining the status quo pending arbitration.

In addition, the parties to this controversy depict very different scenarios when weighing the Gilbert factors. For example, defendant asserts that the ease of access to both witnesses and documents militates in favor of the Alberta forum, whereas plaintiff argues that important witnesses and other sources of proof are located in several places at great distance from Alberta.

As a threshold matter, this Court may not dismiss this case because of forum non conveniens without determining that Alberta is an adequate alternative forum. For example, in Mercier I, 935 F.2d at 430, the First Circuit reversed the district court's dismissal of a case on the basis of forum non conveniens and remanded the case for additional factual inquiry. In so holding, the First Circuit noted that the defendant had failed to affirmatively show the adequacy of the proposed alternative forum, and the plaintiff had not proven that the forum could not

be deemed adequate. Id. at 427. Cf. Tramp Oil and Marine, Ltd. v. M/V Mermaid I, 743 F.2d 48 (1st Cir. 1984) (reversing dismissal by district court under the doctrine of forum non conveniens because district court acted without first identifying an adequate alternative forum). Moreover, the factual predicate for evaluation under the factors articulated in Gilbert is substantially disputed in this case. Therefore, during the additional thirty day period granted by this Court, the parties should also conduct discovery on the issue of forum non conveniens.

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss for lack of personal jurisdiction, or, in the alternative, for forum non conveniens, is held in abeyance. The parties are granted a thirty day period from the date hereof for additional discovery on the issues of personal jurisdiction and forum non conveniens. A full evidentiary hearing before this Court will be scheduled thereafter.

It is so ordered.

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Ronald R. Lagueux
Chief Judge
March , 1997